86-235

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

JOHN B. BELL,

Petitioner,

-against-

THE STATE OF NEW YORK, NEW YORK LAW SCHOOL-KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS.-ANDREA LIKWORNIK and MICHAEL B. REUBEN, individually,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals, Second Circuit, erred in affirming the judgment of the District Court for the Southern District of New York, which judgment awarded attorney pro se litigants costs and attorney's fees pursuant to 42 U.S.C. § 1988.

2. Whether the Circuit Court of Appeals, Second Circuit , erred in affirming the judgment of the District Court for the Southern District of New York, which judgment determined that the State of New York could interpose the Affirmative Defense of Sovereign Immunity to a claim brought under Clause 1, of the 14th Amendment to the United States Constitution.

3. Whether the Circuit Court of Appeals, Second Circuit, erred in affirming the judgment of the District Court for the Southern District of New York, which judgment determined that the State of New York could interpose the Affirmative Defense of Sovereign Immunity to a claim brought pursuant to 42 U.S.C. § 1983.

4. Whether the Circuit Court of Appeals, Second Circuit, erred in affirming the judgment of the District Court for the Southern District of New York, which judgment determined that petitioner's claims against NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS. - ANDREA LIKWORNIK and MICHAEL B. REUBEN, (hereinafter collectively referred to as "Kramer-Levin") were barred under the principle of Res Judicata or Collateral Estoppel, pursuant to 28 U.S.C. § 1738.

* **The parties to the action herein are the original parties to the action as set forth in the caption above.**

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

John B. Bell, on his own behalf, petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit.

OPINIONS BELOW

Opinion of the Court of Appeals for the Second Circuit, the Honorable Irving Kaufman, the Honorable William H. Timbers and the Honorable Thomas J. Meskill, Circuit Judges (App. 1-3), affirming the judgment of the District Court for the Southern District of New York and awarding respondents double costs and attorney's fees (not reported by direction).

Opinion of the District Court for the Southern District of New York, the Honorable Vincent L. Broderick, District Judge (App. 4-23), dismissing the petitioner's complaint as to all respondents, and granting respondents costs and attorney's fees.

JURISDICTION

The Opinion of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court for the Southern District of New York, was filed in the Office of the Clerk of said Court on the 28th

day of March, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Clause 1., which provides in relevant part:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall and State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws.**" (emphasis added)

The Tenth Amendment to the United States Constitution, which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Eleventh Amendment to the United States Constitution, which provides:

> "The judicial power of the United State shall not be construed to

> extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

Congress, through the enactment of 42 U.S.C. § 1983 provided, in relevant part, that a cause of action shall exist for:

> "... the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, by any person acting under color of law of any statute, ordinance, regulation, custom, or usage of any State or Territory."

Congress, through the enactment of 42 U.S.C. § 1985 provided, in relevant part, that a cause of action shall exist where:

> persons conspire to deprive a party of his civil rights by attempting hinder or prevent the duly constituted authorities of a state from giving or secur- to said party the equal protection, priviliges and immunities of the law.

Congress, through the enactment of 42 U.S.C. § 1988 provided, in relevant part, that:

> A court may award costs and attorney's fees to the prevailing party.

Congress, through the enactment of 28 U.S.C. § 1738, provided that:

> "Such acts, records and judicial proceedings or copies thereof, so authenticated, **shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.**" (emphasis added)

STATEMENT OF CASE

Plaintiff graduated from Columbia University in May of 1975 and proceeded to make applications

to various law schools for admissiton for the Fall Term, 1975. By a Scholarship Letter dated July 22, 1975, he was awarded a "full tuition" scholarship to attend New York Law School. He accepted said scholarship and enrolled in New York Law School as a full-time student. Due due financial difficulties, and upon the advice and counsel of the Law School, petitioner transferred to its Evening Division and secured employment to help him to defray his legal education.

Upon attempting to register for the Spring Term, under said scholarship, petitioner was advised that he had lost same due to his transfer to the Evening Division. In July, 1977, petitioner was forced to take a Leave of Absence for financial reasons. While on said Leave of Absence, petitioner continued to fill-out Status Reports as required by New York Higher Education Assistance Corporation, to preserve his Guaranteed Student Loans. However, while petitioner forwarded these

Status Reports to the Law School, the Law School failed to complete their certification and forward the Reports to New York Higher Education Assistance Corporation. As a result thereof, petitioner's Guaranteed Student Loans were placed in default and ultimately, petitioner was compelled to withdraw from school due to the lack of financial resources.

Through the good offices of a subsequent employer, Cravath, Swaine & Moore, Esqs., petitioner was readmitted to New York Law School for the Fall Term, 1981 and graduated from said Law School in May, 1983.

In November, 1983, petitioner brought an action in the Supreme Court, New York County, under Index No. 28103/83, alleging that the Law School breached it contract with petitioner to provide him with a full-tuition scholarship and alleging that New York Higher Education Assistance Corporation and Chemical Bank, breached their contract with

petitioner relating to the terms and conditions of the Guaranteed Student Loan.

New York Higher Education Assistance Corporation defaulted in answering and a Default Judgment was entered against it by the Hon. Felice K. Shea. Predicated upon said judgment, petitioner took a Jury Inquest and, on the 13th day of June, 1984, the jury awarded petitioner $80,000.00 in Compensatory and Personal Damages against said defendant. Said judgment was subsequently vacated on the ground that said defendant had not beem properly served, the vacatur was affirmed by the Appellate Division, First Department and a motion is pending in the New York Court of Appeals for leave and permission to appeal to said Court.

New York Law School moved for dismissal of the complaint against it on the ground that the action was time-barred under the applicable Statute of Limitations. Petitioner, after the Law School admitted the award of a full-tuition scholarship and after

demonstrating that under applicable Contract Law that his entire claim was not extinguished under the Statute of Limitations, petitioner moved for summary judgment. The motions came on to be heard before Special Term, Part I (George B. Smith, J.), on or about the 11th day of January, 1984. The decision on the motions were rendered on the 12th day of April, 1984, which granted New York Law School's motion to dismiss and denied petitioner's cross-motion for summary judgment. Special Term, contrary to the record then and there before it, found that petitioner's claims were time-barred and said finding was predicated upon Special Term's reliance upon an inadmissible document submitted in support of the Law School's claim that the "full tuition" scholarship awarded petitioner was in fact, a full-tuition scholarship only for one year. (See discussion of the two Memorandum Decisions of Special Term, App. 54-58.)

The judgment of Special Term was affirmed by the Appellate Division, First Department, his appeal

as of right, on the ground that Special Term's actions constituted a deprivation of substantive due process, was dismissed sua sponte, and his subsequent motion for leave and permission to appeal to the New York State Court of Appeals was denied. (App. 41-43)

THE PROCEEDINGS IN IN THE DISTRICT COURT

Petitioner commenced an action in the District Court for the Southern District of New York against the State of New York, New York Law School, Kramer, Levin, Nessen, Kamin & Frankel, Esqs., Andrea Likwornik and Michael B. Reuben, individually (hereinafter referred to as "Kramer-Levin"), alleging violations of 42 U.S.C. §§ 1983 and 1985, respectively. (App. 44-77) Petitioner alleged that the State of New York, under color of law and in derogation of his constitutional rights secured under Clause 1 of the Fourteenth Amendment to the United States Constitution, 1) denied petitioner a fair and impartial

hearing on his claims against New York Law School, 2) failed and refused to apply New York Contract Law in ascertaining whether or not petitioner's claims against New York Law School were properly time-barred under the Statute of Limitations, 3) failed and refused to apply New York Law of Evidence to ascertain the admissibility of the documentary evidence used to allegedly modify the terms of the Scholarship Agreement, 4) failed and refused to apply New York Summary Judgment Law by accepti "factual allegations" made by New York Law School in lieu of "admissible documentary evidence" as required by said law, and 5) failed and refused to correctly apply New York's Statute of Limitations to petitioner's claims against New York Law School.

As to Kramer-Levin, petitioner alleged that said respondents, in violation of 42 U.S.C. § 1985, 1) conspired to deprive petitioner of his Civil Rights by perpetrating a fraud upon the State Court by wilfully introducing into evidence, a document which

they knew was inadmissible, 2) conspired to wilfully deprive petitioner of his Civil Rights by perpetrating a fraud upon the State Court by knowingly and impermissibly arguing that petitioner's claims were time-barred, when they knew that a portion of petitioner's claims were within said statute, 3) conspired to wilfully deprive petitioner of his Civil Rights by perpetrating a fraud upon the State Court by knowingly and impermissibly arguing that petitioner's contention relating to the installment nature of the scholarship and the contractual principle applicable thereto were erroneous, 4) conspired to wilfully deprive petitioner of his Civil Rights by perpetrating a fraud upon the State Court by knowingly and impermissibly offering in evidence, and arguing in support of its admissibility, a Grant-In-Aid Statement which they knew was contrary to the Law of Evidence and Contract Law, 5) conspired to wilfully deprive petitioner of his Civil Rights by perpetrating a fraud upon the State Court by knowingly and impermissibly

arguing that the Scholarship Letter, as modified by the said Grant-In-Aid Statement, supported their allegation that the scholarship awarded petitioner was only for one year, when they knew that they had already admitted that petitioner was awarded a full scholarship upon petitioner's acceptance as a full-time student to the Day Division, 6) conspired to deprive petitioner of his Civil Rights by perpetrating a fraud upon the State Court by knowingly and impermissibly arguing that the Scholarship Letter was not acontract, said argument in direct contravention of Contract Law, 7) conspired to deprive petitioner of his Civil Rights by perpetrating a fraud upon the State Court by knowingly and impermissibly arguing that petitioner did not accept New York Law School's offer of the Scholarship, in spite of existing facts, 8) conspired to deprive petitioner of his Civil Rights by perpetrationg a fraud upon the State Court by knowingly and impermissibly arguing that the affidavit of

of Assistant Dean Bearn, in and of itself, was sufficient to defeat petitioner's motion for summary judgment, said argument in direct contravention of New York Summary Judgment Law. Petitioner argued that the actions of Kramer-Levin were for the specific purpose of hindering and preventing the duly constituted authorities of New York State from giving or securing to petitioner the equal protection, privileges and immunities of the law, and their arguments, contrary to The Code of Profession Conduct (Appendix -Judiciary Law), lacked good-faith for the extension, modification or reversal of existing law.

The District Court for the Southern District of New York, dismissed the complaint against the State of New York on the ground that the action was barred under the Eleventh Amendment to the United States Constitution, assessing costs and attorney's fees against petitioner pursuant to 42 U.S.C. § 1988, in the sum of $1,237.00.

The District Court for the Southern District of

New York, dismissed the complaint against Kramer-Levin, with prejudice, on the grounds that petitioner failed to allege a class-based discriminatory animus, that the action constituted a relitigation of the State Court action and that the complaint was so devoid of merit that the amendatory procedure provided under Fed. R. Civ. P. Rule 15(a), could not be used to pump merit into it, assessing costs and attorney's fees against petitioner pursuant to 42 U.S.C. § 1988, in the sum of $8,095.14.

THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, ERRED IN AFFIRMING THE AWARD OF COSTS AND ATTORNEY'S FEES TO PRO SE ATTORNEY LITIGANTS UNDER § 1988

Under the provisions of 42 U.S.C. § 1988, a court may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, in an action or proceeding brought to enforce a provision of §§ 1981, 1982, 1983, 1985 and 1986 of the Civil Rights Act. Usually, costs and

attorney's fees are awarded to plaintiff's who prevail in vindicating fundamental rights. Such costs and attorney's fees may be awarded to a defendant, in an action where it is found that the plaintiff initiated or maintained a patently frivolous action for the sole purpose of harassing a defendant or other vexatious reasons. Petitioner respectfully contends that the Second Circuit erred in affirming the award of costs and attorney's fees to the defendants on two distinct grounds, 1) petitioner's action was not patently frivolous, nor was it initiated or maintained for harassing or vexatious reasons, and 2) under the provisions of 42 U.S.C. § 1988, and case law thereunder, it is unclear as to whether an attorney pro se litigant is entitled to receive said costs and fees, or whether said attorney pro se litigants should be treated lilke any any other pro se litigant, precluding recovery of such costs and fees.

In Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), a divided Court found that an attorney pro

se litigant was entitled to receive costs and attorney's fees under 42 U.S.C. § 1988. Said Court found that:

> "Only one Court of Appeals, the Ninth Circuit, has considered the issue of whether a lawyer litigant proceeding pro se is entitled to attorney's fees under section 1988. Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The Ellis court determined that defendants who were attorneys and who represented themselves were entitled to fees. ... Ellis was cited as persuasive authority in Rybicki v. State Board of Elections, 584 F. Supp. 849 (N.D. Ill. 1984)(three-judge court) where an attorney pro se was granted fees under section 1988. **but see Lawrence v. Staats, 586 F. Supp. 1375 (D.D.C. 1984)** (attorney pro se plaintiff not entitled to fees."(see, also, Durham v. Brock, 498 F. Supp. 213, 225-26 (M.D. Tenn. 1980), aff'd 698 F.2d 1218 (6th Cir. 1982).

In Duncan v. Poythress, supra, the Eleventh Circuit reversed the District Court's denial of attorney's fees to an attorney who withdrew as co-counsel in order to testify, and who was made a party plaintiff to the action. The attorney alleged that subsequent to her withdrawal, that she represented herself, despite the

fact that the other two attorneys representing the plaintiffs, continued their representation of the plaintiffs. The plaintiffs prevailed in the action and the defendants, in an out-of-court settlement, agreed to pay the two attorneys who represented teh plaintiffs, but refused to pay the attorney-plaintiff. The District Court denied her application for attorney's fees for representing herself and denied her application for attorney's fees for the time she represented the plaintiffs prior to her withdrawal.

The Circuit Court of Appeals, Chief Judge Godbold and Judges Rodney and Henderson, dissenting, reversed and remanded the matter to the District Court for a determination of attorney's fees, 1) for the time she represented herself, and 2) for the time she represented the plaintiffs. The rationale of the majority purports to distinguish between lay persons proceeding pro se and attorneys proceeding pro se, a distinction which finds no support in the plain language of 42 U.S.C. § 1988. In

reaching its determination that the attorney pro se was entitled to attorney's fees, the Court found that:

> "The question before this court is whether attorneys who proceed pro se should be treated like other attorneys (prevailing plaintiff's attorney(s) presumptively entitled to fees) for the purposes of section 1988.
>
> The court below denied Kessler's application for fees based upon cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. Unit B 1981), in which the Court denied fees to the plaintiff, a non-lawyer, who appeared pro se. The specific issue of fees for a lawyer appearing pro se was not addressed in Cofield (Cites omitted). Only one court of appeals, the Ninth Circuit, has considered the issue of whether a lawyer litigant proceeding pro se is entitled to attorney's fees under section 1988. Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). ... Although Ellis is unlike the present case in that it concerned an attorney pro se defendant, the Ellis court's reasoning is, in large part, applicable to the present case."

The Duncan Court determined that the plain language of § 1988 did not preclude an award of fees to a lawyer proceeding pro se and that the absence

of any express prohibition strongly suggests the allowance of a fee, unless the legislative history provided otherwise and that the legislative history of § 1988 does not address that issue. The Court went on to point out (citing Cofield, supra.) that:

> "... section 1988 was enacted to 'enable and encourage a wronged person to retain a lawyer.' ... Rybicki 584 F. Supp. at 589 ('The courts, in denying lay pro se litigants) reason that the principle purpsoe of § 1988 (to encourage lay persons to to retain lawyers in meritorious civil rights cases) is not further by compensating a non-lawyer litigant who decides to proceed pro se. The court below echoed these sentiments: 'The primary concern of Congress was to increase the level of competence with which such complaints are prosecuted. (Cite omitted) In the case of an attorney pro se litigant such as kessler, this congressional purpose is fulfilled. Kessler utilized a lawyer to pursue her claims; therefore, she utilized the kind of skilled advocate competent to pursue legal claims, **as is evidenced by a license to practice law**, that the framers of section 1988 envisioned. ... Thus, although we agree with

> the court below that section 1988 was not passed solely for the benefit of lawyers, it was passed so that plaintiffs, lay or lawyer, could have legally trained representatives in their cases, like the present one, where important constitutional rights are at stake."

The Duncan Court goes on to make further distinctions between lay pro se litigants and attorney pro se litigants, concluding that attorney pro se litigants are entitled to receive attorney's fees and lay pro se litigants cannot becase a lay pro se litigant **cannot sell legal services in the open market and the criteria for awarding attorney's fees under § 1988 is what the market for such services was.** The Court found that lay pro se litigants' services have no market value, and additionally, the Johnson factors include opportunity costs and such costs **would be much more complicated to evaluate for the lay pro se litigant.**

Petitioner respectfully contends that the distinction between lay pro se litigants and attorney pro se litigants are, for the most part, irrational, patronizing and most likely, constitutionally suspect. 42

U.S.C. § 1988 substantially provides that a court may award costs and attorney's fees to the prevailing party, the operative term of § 1988 being "attorney's fees". Judge Rodney, dissenting in Duncan, poignantly touched this point stating:

> "The sole source for the imposition of liability against the defendants for the prevailing plaintiff's attorney's fees in this case is 42 U.S.C. § 1988. There Congress provided that in a suit such as this to enforce a provision of 42 U.S.C. § 1983, 'the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs.
>
> This case turns on the meaning of the word 'attorney'.' Although the majority believes the 'plain language' of section 1988 does not preclude an award of fees to a lawyer representing herself, 'we have simply been unable to find any definition which permits a decision that a pro se attorney has an attorney'. Set forth in an appendix to this opinion are the definitions found in over two dozen dictionaries. **Without exception they define the word 'attorney' in terms of someone who is employed as an agent to represent another, someone who acts at the appointment of an-**

> **other.** A basic principle of agency law is that '[t]here is no agency unless one is acting for and in behalf of another, since a man cannot be the agent of himself.' 2A C.J.S. Agency Sec. 27, at 592. For there to be an attorney in litigation, **there must be two people.** Plaintiff here appeared pro se. The term 'pro se' is defined as an individual action 'in his own behalf', in person. **By definition, the person appearing 'in person' has no attorney,** no agent appearing for him before the court. The fact that such plaintiff is admitted to practice law and available to be an attorney for others, **does not mean that the plaintiff has an attorney,** any more than any other principal who is qualified to be an agent, has an agent when de deals for himself. **In other words, when applied to one person in one proceeding, the terms 'pro se' and 'attorney' are mutually exclusive."** (Id. 1517-1518)(emphases added)

The eminent rationality of Judge Rodney's analysis of § 1988, is to be found in the mutual exclusion of the terms "pro se" and "attorney", acting in one's own behalf and acting for an in behalf of another, respectively. While the majority in Duncan contended that the primary concern of Congress, in

enacting § 1988, was to increase the level of competence with which such complaints are prosecuted, they have failed to establish that the competence desired by Congress can only be achieved through a person "licensed to practice law". If, indeed, Congress' primary concern was to increase the level of competence with which such complaints are prosecuted, the it would logically follow that § 1988 costs and attorney's fees should be awarded to any pro se litigant who achieves that level of competence and prevails in the action, regardless of whether said pro se litigant is admitted to practice law or not. The awarding of attorney's fees to attorney pro se litigants, and denying such fees to lay pro se litigants who are acting as private attorneys general, where both have demonstrated the requisite skills and prevailed in the litigation, cannot be supported on any rational basis and at best, must be viewed as a totally discriminatory practice. Such a distinction is wholly arbitrary and capricious and bears no rational rela-

tionship to the congressional objective in enacting §1988 and is constitutionally defective.

Another artificial and wholly unjustified finding by the Duncan Court, citing favorably Ellis and Rybicki, was that attorney pro se litigants suffer **actual pecuniary loss, since they are required to take time away from their practices to prepare and defend suits.** While it may be true that attorney pro se litigants incur pecuniary loss, it cannot be gainsaid that lay pro se litigants similarly incur pecuniary loss, since they too, are required to take time away from their professions or employment to prepare for litigation and their losses are just as substantial as the losses incurred by attorney pro se litigants, relatively speaking. The Distict Court, and correctly so, found that § 1988 was enacted to "enable a wronged person to **retain a lawyer**" and the lawyer so retained, may be awarded attorney's fees if the party prevails. This comports with Judge Rodney's conclusion that "for an attorney to

to be in the litigation, there must be two people". It cannot be gainsaid that an attorney pro se litigant may be a wronged person and that as such, is entitled to retain an attorney to represent him or her to prosecute his or her grievance and, under the provisions of § 1988, may recover reasonable attorney's fees as part of the costs. However, where an attorney make the decision to proceed pro se, then said attorney is not entitled to any more, or any less, than any other pro se litigant, merely because he or she is licensed to practice law. It must be reasonably inferred that had the framers of § 1988 intended that attorney pro se litigants were entitled to said fees, they would have made their intention clear. Once an attorney makes his or her decision to proceed pro se, he or she should not be heard to complain of pecuniary loss, since he or she could have retained an attorney.

Both Duncan and Ellis bypassed the fundamental bar to the awarding of attorney's fees to

attorney pro se litigants, the "plain language" of § 1988. Judge Rodney, in finding that under § 1988 Kessler should not have been able to receive an award of attorney's fees for representing herself, correctly concluded:

> "Where the language of a statute is not ambiguous and does not lead to absurd results, the job of the court is to apply it as written." (cite Omitted)(Id. 1518)

The language of § 1988 is not ambiguous and, when properly applied, does not lead to absurd results. The absurdity of the results, of awarding attorney's fees to attorney pro se litigants, and denying same to lay pro se litigants where both have achieved the same results, is amply demonstrated in Ellis and Duncan. Both Courts can be observed reaching beyond the language of § 1988, to justify the awarding of attorney's fees to attorney pro se litigants. While, as the Duncan Court observed, there are no expressed prohibitions in § 1988 to the awarding of attorney's fees to attorney pro se litigants, one

must also logically conclude that there is no expressed authority for the awarding of such attorney's fees to attorney pro se litigants. Since the language of § 1988 is not ambiguous, it should be applied as written and construed as meaning that a prevailing party may, as part of the costs, recover reasonable attorney's fees, and the terms "pro se" and "attorney" should be mutually exclusive for the purposes of § 1988.

Petitioner respectfully contends that the Second Circuit erred in affirming the award of attorney's fees to the attorney pro se litigants.

POINT II

THE SECOND CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DETERMINATION THAT THE STATE WAS IMMUNE TO THE SUIT UNDER THE ELEVENTH AMENDMENT

The Second Circuit erred in affirming the District Court's determination that petitioner's suit against the State of New York was barred under the Eleventh Amendment to the united States Constitu-

tion. As is evident from the opinion of the District Court, it totally ignored the 14th Amendment violations alleged in the complaint and held that petitioner's claims were barred by the Eleventh Amendment. (App. 16-17)

In Jordan v. Trainor, 551 F.2d 873, affirmed 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1977), the Court found that:

> "When the action is, in essence, one for recovery of money from a state, **and the action is not brought under a statute enforcing a right against the state under Amend. 14 Sec. 1,** the state is entitled to invoke its sovereign immunity from suit." (emphasis added)

The States' inability to raise their sovereign immunity to an action under the 14th Amendment had been recognized at early as Ex Parte Virginia, 100 U.S. 339, 346-347 (1880), wherein said Court held:

> "We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, 'No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United

> States, ... nor deny to any person within its jurisdiction the equal protection of the law.' 100 U.S., at 346.
>
> It is these which Congress is empowered to enforce, **and to enforce against State action**, however put forth, whether that action be executive, legislative or judicial. **Such enforcement is no invasion of State Sovereignity.** No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. Ibid." (emphases added)

It cannot be gainsaid that the 14th Amendment is directed to the States, however, under the decision and judgment of the instant case, both the District Court and the Court of Appeals for the Second Circuit, in effect, have held that there is no remedy available at law to a party aggrieved by a State's violation of the mandate of the 14th Amendment. This proposition, and the holdings in Jordan v. Trainor and Ex Parte Virginia, supra, are at apparent odds. If, as The State of New York contended in its arguments in the District Court and the Court of Appeals, that petitioner's claims against it are barred by the Eleventh Amendment, then

it must be logically concluded that Congress, in enacting the 14th Amendment, was merely engaging in an exercise in futility and that the Eleventh Amendment made the 14th Amendment a complete nullity as same applied to violations of citizens rights, privileges and immunities allegedly secured thereby. Petitioner respectfully contends that it is well-established law that the enactment of a law is presumed to be constitutional until otherwise held by a court of law. Therefore, if both the Eleventh and Fourteenth Amendments to the United States Constitution are constitutional, then it must be logically concluded that they are mutually exclusive. Petitioner further respectfully contends that the mutual exclusivity of the said Amendments is apparent from the plain language of same. The Eleventh Amendment bars the bringing of a suit against a State by a citizen of said State or of a foreign State, for the recovery of money, when such a suit is not brought to enforce a right under Clause 1 of the 14th Amendment, such as where a citizen or foreign citizen initiates an action against a State in Tort, Contract, etc. How-

ever, when a citizen or foreign citizen initiates an action against a State for the deprivation of any of the rights, privileges and immunities secured under the Fourteenth Amendment, a State may not avoid the consequences of its actions by interposing its immunity from suit by reason of Sovereign Immunity.

Petitioner respectfully contends that the Court of Appeals for the Second Circuit erred in affirming the findings of the District Court that The State of New York could interpose its Sovereign Immunity to petitioner's suit brought pursuant to the 14th Amendment.

THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S FINDING THAT THE STATE OF NEW YORK COULD INTERPOSE ITS SOVEREIGN IMMUNITY AS AN AFFIRMATIVE DEFENSE TO THE 42 U.S.C. SECTION 1983 ACTION

Petitioner respectfully contends that the Circuit Court of Appeals for the Second Circuit erred in affirming the District Court's finding that The State of New York could interpose its Sovereign Immunity to an ac-

tion brought pursuant to Section 1983. Being fully cognizant of this Court's holding in Quern v. Jordan, 440 U.S. 332 (1979), and its rejection of Justice Brennan's dissenting opinion therein, petitioner respectfully requests that this Court take under reconsideration said holding relating to the term "person" as set forth in Section 1983.

In Quern v. Jordan, supra, at page 346, Justice Brennan pointed out that:

> "On February 25, 1871, less than two months before the enactment of the Civil Rights Act, Congress provided that 'in all acts hereafter passed ... the word 'person' may extend and be applied to bodies politic and corporate ... unless the context shows that such words were intended to be used in a more limited sense. §2, 16 Stat. 431."

Justice Brennan, through other and various citations to the Congressional Record of the time, indicated that it was Congress' intention that the Civil Rights Act of 1871 was to apply to States, as individuals did not possess the powers proscribed therein. This Court, in Quern v. Jordan, supra, questioned Justice Brennan's

interpretation of legislative intent and rejected same as being unsubstantiated. While the Court is eminently qualified to fathom congressional intent in the enactment of our laws, petitioner respectfully contends that the Court may have overlooked the historical aspects of the enactment of the Civil Rights Act of 1871, which more closely align themselves with Justice Brennan' s interpretation of congressional intent than the majority's finding in Quern v. Jordan, supra.

Petitioner respectfully contends that Justice Brennan's arguments, even if only partially supported by legislative history, are fully supported by historical events and common sense. The Civil Rights Act of 1871 was enacted approximately six years after this Country had emerged from a bloody civil war in which States' Rights was the predominant issue. It is common knowledge that hundreds of thousands died on each side of the issue of States' Rights and it would be ludicruous to assume that Congress, in arguing and enacting the Civil Rights Act of 1871, would surrender to the States that which was won by the sacrifice of hundreds of

lives of men who fought to wrest control of basic human rights from the States and vest same in the Federal Government. Petitioner further respectfully contends that it was not through some inadvertence that when this issue was tested in Ex Parte Virginia, supra, that this Court set the record straight as to Congress' power to enact such legislation which prohibited the States from infringing upon its citizens' rights, privileges and immunities, stating that "Such enforcement is no invasion of State Sovereignty".

Petitioner respectfully contends that under this Court's holding in Quern v. Jordan, supra, there is no remedy for an aggrieved party who has suffered constitutional deprivations at the hands of a State, except injunctive relief which may not make the aggrieved party whole and which cannot act as a deterrent to States' violations of the 14th Amendment. In effect, the 14th Amendment is a classic example of too little, too late. Petitioner respectfully contends that it could hardly be the intentions of Congress to provide such an anemic remedy to safeguard such a vital and fundamental

human rights. In its majority opinion, this Court alluded to England's Civil War waged for Parliamentary Reform as somehow supporting Sovereign Immunity as imported into this Country by our Founding Fathers. However, it should be remembered that the institution of Parliamentary Government effectively sounded the death knell for Sovereign Rule in England and initiated the decline of Sovereign Reigns throughout most of Europe, changing the political landscape radically and irreversibly.

Petitioner respectfully contends that even the States have recognized that Sovereign Immunity, in today's progressive structure, is an anacronism. Most, if not all, States have enacted legislation similar to New York State's Court of Claims Act, whereby Sovereign Immunity is waived in said Courts of Claim. Therefore, aggrieved citizens may sue a State in its Court of Claims where said State has agreed to waive its Sovereign Immunity. The main rationale, under the Eleventh Amendment relating to the awarding of money damages against a State, is that such a recovery would have to be paid from the State's Treasury. It is anti-

thetic to the whole principle of Sovereign Immunity that a State may raise such a defense to the violation of fundamental human rights, but cannot raise such a defense to a party suing it for breaking a bone due to a State's negligence, nor can it be gainsaid that any recovery of money damages must be paid out of the public treasury or other fund established by the State for said purpose. While such an anachronism may still be available to the States in certain litigation, clearly, it has not place in federal litigation where the issues in controversy are constitutionally guaranteed rights, privileges and immunities. Under the present interpretation of the Eleventh Amendment, as affirmed by the Second Circuit Court of Appeals, no action exists in federal court for a party aggrieved by the deprivation of constitutionally secured rights, privileges and immunities against a State, except injunctive relief. This finding and affirmance does not comport either with applicable law, or with the basic tenets of American Jurisprudence, which provides that for each wrong there is a remedy.

Petitioner respectfully contends that legislative history, American History and common sense supports the proposition that Congress fully intended that States were persons under the Civil Rights Act of 1871 and therefore, are persons under 42 U.S.C. §1983, and further respectfully contend that any Sovereign Immunity a State may possess, has been abrogated by said Statute making a State liable to a citizen which it has deprived of constitutionally guaranteed rights, privileges and immunities, and that the Eleventh Amendment is not a bar to an action brought pursuant to 42 U.S.C. §1983.

THE CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE FINDING OF THE DISTRICT COURT THAT PETITIONER'S CLAIMS AGAINST KRAMER-LEVIN WERE BARRED PURSUANT TO 28 U.S.C. §1738

Petitioner respectfully contends that the Circuit Court of Appeals erred in affirming the finding of the District Court that petitioner's claims against Kramer-Levin were barred under the provisions of 28 U.S.C. §1738. The said Kramer-Levin was named parties de-

fendant in the instant action and it was alleged that Kramer-Levin violated petitioner's Civil Rights in violation of 42 U.S.C. §1985, in that their conduct in the State Court action constituted a conspiracy to prevent the constituted authorities of the State of New York from according petitioner the equal protection, privileges and immunities of its laws. (App. 44-77) The allegations of the District Court complaint clearly evidences that the issues therein were different from the issues petitioner raised in the State Court action. (App. 24-38)

The District Court found, and the Circuit Court of Appeals affirmed said finding, that:

> "Here, again, the plaintiff lost a legal action in the state; he appealed; the result of the trial court, in Special Term Part 1, was affirmed on appeal; **and so now he is attempting to try the matter against in this court.** (App. 19) ...
>
> Plaintiff is purely and simply a disappointed state litigant. (App. 19) ...
>
> This complaint is a pleading which on its face has no merit, and there is no way that the amendment pro-

> cess could possibly be used to pump merit into it." (Ibid)

The Circuit Court of Appeals, in affirming the District Court's findings, held that:

> "Bell contends the district court erred by dismissing his complaint for failure to state a claim. **The appellant, however, provided no support for his assertion that the appellees had engaged in a conspiracy**, and admitted that he failed to allege a class-based discriminatory animus." (emphasis added)

The record adequately reflects the fact that petitioner did not contend that the District Court erred in dismissing the complaint for failure to state a claim, but contended that the dismissal, with prejudice, was unwarranted as Fed. R. Civ. P. Rule 15(a), provide the procedure for curing the defective pleading. The District Court's finding that "there is no way that the amendatory process could possibly be used to pump merit into it", was a completely fortuitous statement which was not supported by the record.

The Circuit Court of Appeals finding that petitioner "provided no support for his assertion that the

appellees had engaged in a conspiracy", was equally fortuitous and belied by the very nature of the attorney-client relationship. It is more than common knowledge that an attorney must consult with his client before taking any action in litigation and, indeed, appellees' costs and attorneys' fee clearly evidenced that such conferences took place. Therefore, it would be incongruous to assume that the Law School's attorneys conducted its defense without consulting with it and receiving its approval of the defenses proffered. The introduction of the affidavit of Assistant Dean Margaret Bearn clearly demonstrated that the Law School participated in its defense and therefore, the appellees conspired in putting in said defense.

The District Court's finding, and the Circuit Court of Appeals' affirmance thereof, that the District Court action was an attempt to relitigate the State Court action, was reversible error. The findings that the federal action was barred under the principles of res judicata, 28 U.S.C. §1738, was un-

warranted. Under the provisions of 28 U.S.C. §1738, State Court proceedings are entitle to full-faith and credit in federal court. It is well-established law that before a federal court can give a State Court judgment full-faith and credit, it must first be ascertained that the State Court would give its judgment full-faith and credit. Petitioner argued that even under the full-faith and credit clause of 28 U.S.C. §1738, the State Court judgment would not preclude any of the issues then and there before the District Court. Petitioner argued that the trial court merely decided that petitioner's contractual claims against the Law School were barred by the Statute of Limitations and said judgment was affirmed by the Appellate Division, First Department. without opinion. Therefore, the Appellate Division made no determinations on the issues which formed the predicate of the federal action. (App. 39-40) The Court of Appeals of the State of New York refused to hear the case and therefore, made no determinations as to the merits of petitioner's case. (App. 41-43)

Petitioner, as hereinabove set forth, respectfully contends that before a federal court may grant a preclusive effect to a State Court judgment, it must first ascertain whether such an effect would be accorded the judgment in the forum State. The Court of Appeals of the State of New York, in Charles H. Greenthal & Co., Inc. v. Lefkowitz, 32 N.Y.2d 457, 346 N.Y.S.2d 234, 299 N.E.2d 657, held that:

> "... Where the **same issues** and the **same parties** were not brought together in any prior litigation, **principles such as waiver, estopple and collateral estoppel were not applicable.**" (emphases added)

Similarly, in Goodman v. Solack Estates, Inc., 78 A.D.2d 513, 437 N.Y.S.2d 5, the Court held that:

> "... Collateral estoppel could not be applied to a law firm on the basis of a judgment entered against a client, in which the law firm was not a litigant, but acted solely as counsel."

Petitioner respectfully contends that under the laws of the State of New York, a preclusive effect could not be given to the State Court judgment to effectuate collateral estoppel to petitioner's federal

action.

Petitioner respectfully contends that the Circuit Court of appeals' affirmance of the District Court's finding that petitioner's action was precluded by the State Court judgment was reversible error.

REASON FOR GRANTING WRIT

Petitioner respectfully contends that the instant Writ should be granted, primarily, because the Federal Court are split on the issue of whether attorney pro se litigants are entitled to costs and attorney's fees under 42 U.S.C. §1988. The Ninth Circuit, in Ellis v. Cassidy, 625 F.2d 227 (1980), held that attorney pro se litigants were entitled to costs and attorney's fees under §1988. Similarly, in a 4-3 decision, the Eleventh Circuit held that said litigants were entitled to costs and attorney's fees. However, the Sixth Circuit, in Durham v. Brock, 498 F. Supp. 213, 225-226 (M.D. Tenn. 1980) affirmed 698 F.2d 1218 (1982) and the District of Columbia, in Lawrence v. Staats, 586 F. Supp. 1375 (1984), have held that attorney pro se litigants were not entitled to costs

and attorney's fees under §1988. The instant Writ should be granted to resolve the issue of whether attorney pro se litigants, vis-a-vis lay pro se litigants are entitled to costs and attorney's fees.

Petitioner respectfully contends that the instant Writ should be granted to ascertain whether the Circuit Court of Appeals erred in affirming the District Court's finding that a State may interpose the affirmative defense of Sovereign Immunity to a claim brought pursuant to Clause 1 of the Fourteenth Amendment to the United States Constitution.

Petitioner respectfully contends that the instant Writ should be granted for the Court's reconsideration of its previous holdings that a State is not a person within the meaning of 42 U.S.C. 1983 and may therefore claim Sovereign Immunity from a suit pursuant to 42 U.S.C. §1983.

Petitioner respectfully contends that the instant Writ should be granted to ascertain whether the Circuit Court of Appeals erred in affirming the District Court's finding that petitioner's claims against Kramer-Levin

were properly precluded by the State Court judgment entered in favor of the Law School and against the Petitioner, and that petitioner was not entitled to utilize Fed. R. Civ. P., Rule 15(a) to amend the defective pleadings.

CONCLUSION

Predicated upon the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

JOHN B. BELL
Petitioner, Pro Se

/s/

June 6, 1986

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of March one thousand nine hundred and eighty-six.

Present:

HONORABLE IRVING R. KAUFMAN
HONORABLE WILLIAM H. TIMBERS,
HONORABLE THOMAS J. MESKILL,
Circuit Judges.

---x

JOHN B. BELL,

Plaintiff-Appellant,

-against- 85-7893

THE STATE OF NEW YORK, NEW YORK LAW SCHOOL, KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., ANDREA LIKWORNIK and MICHAEL B. REUBEN,

Defendants-Appellees.

---x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District

Court for the Southern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Bell contends the district court erred by dismissing his complaint for failure to state a claim. The appellant, however, provided no support for his assertion that the appellees had engaged in a conspiracy, and admitted that he had failed to allege a class-based discriminatory animus. Judge Broderick, therefore, properly ruled that Bell's allegations were completely frivolous and were wholly unavailing to state a cognizable claim pursuant to 42 U.S.C. § 1985. Accordingly, the complaint was correctly dismissed. Fed. R. Civ. P. 12(b)(6).

2. Bell also contends the district judge erred by imposing costs and attorney's fees against him. Judge Broderick, however, on two occasions warned the appellant of the risk of sanctions and urged Bell to withdraw his complaint. In light of Bell's obdurate pursuit of his patently meritless claims, the fees and costs were fully warranted. Gerena-valentin v. Koch, 739 F.2d 755, 761 (2d Cir. 1984); see also Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).

3. Accordingly, the judgment of the district court is affirmed.

4. Bell pursues the same frivolous points on appeal that he addressed to the district court. Accordingly, we award to the applees double costs and attorney's fees, pursuant to Fed. R. App. 38 and

28 U.S.C. § 1912. see Mone v. Commissioner, 774 F.2d 570, 574 (2d Cir. 1985)

/S/
Irving R. Kaufman

/S/
William H. Timbers

/S/
Thomas J. Meskill

Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF NEW YORK

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JOHN B. BELL,

Plaintiff,

-against-

THE STATE OF NEW YORK,
NEW YORK LAW SCHOOL- KRAMER,
LEVIN, NESSEN, KAMIN & FRANKEL,
ESQS., ANDREA LIKWORNIK and
MICHAEL B. REUBEN, individually,

Defendants

----------x

October 17, 1985
9:25 a.m.

Before:

HON. VINCENT L. BRODERICK,

District Judge

APPEARANCES

JOHN B. BELL,
Appearing pro se

ROBERT ABRAMS,
Attorney General for the State of New York
Two World Trade Center
New York, New York 10047
RANDOLPH VOLKELL,
Assistant Attorney General

KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL
Attorneys for New York Law School and attorneys pro se
919 Third Avenue
New York, New York 10022
MICHAEL B. REUBEN,
of Counsel

(Case called)

THE COURT: I think we will start off by receiving an explanation from Mr. Bell as to why he was not at the last conference.

MR. BELL: Your Honor, I wasn't at the last conference because the last conference on October 15th I requested a conference from the court. The motion that was scheduled on October 20th proceeded. When I served my papers on teh court on the 8th --

THE COURT: Mr. Bell, are you admitted to the bar?

MR. BELL: No, sir.

THE COURT: You probably are going to apply for admission to the at some stage, are you?

MR. BELL: Yes.

THE COURT: Maybe you better learn when you speak in court you stand up.

MR. BELL: Yes. sir.

On the 8th when I served my papers on the court I advised your law assistant, Mr. Cott, that

the request for the conference and the issues that were going to be conferenced became moot.

THE COURT: Let me tell you something now, Mr. Bell, and you better remember this if you are planning to practice law in this state: when a judge sets a conference the judge is the only one who has the power to cancel that conference. Do you understand that?

MR. BELL: Yes, sir.

THE COURT: All right. We will take up the motions to dismiss the amended complaint.

Let me just review where we are.

We had a conference I believe on August 20 in which I strongly suggested to Mr. Bell that a reading of his amended complaint indicated to me its lack of merit, and I suggested to him at that time that he should give very serious consideration to discontinuing this action.

And on the possibility, which I considered a fairly unlikely one, that he would not discontinue the action, we set a schedule for the defendants' motions to dismiss.

Mr. Bell's next step was to, as I recall, file a motion for summary judgment, which was filed without the premotion conference which I require, and so it was dismiss on that basis. Obviously that dismissal was without prejudice.

In the meantime the parties have

filed their papers with respect to defendants' motion to dismiss.

We will now proceed with argument on that.

Mr. Volkell.

MR. VOLKELL: Your Honor, I think our arguments are covered entirely in our papers, but very briefly, in the first instance, since Mr. Bell has named the State of New York as defendant, we think that it is quite clear that the state is protected by the immunity afforded by the Eleventh Amendment.

THE COURT: Mr. Bell suggests that you've got some nerve to suggest that the complaint be dismissed on this basis, that that is an affirmative defense and that you should have asserted it as an affirmative defense.

MR. VOLKELL: I think there is a fairly substantial body of authority that does allow for dismissal on the basis of the Eleventh Amendment immunity. Going back to the 1800's, in Hans v. Louisiana the United States Supreme Court in 1890 held that in the absence of its consent the state is absolutely immune from any action brought in federal court by one of its own citizens.

For the past 95 years or so cases have been dismissed on those grounds.

In this case, though, even if Mr. Bell had sued the individual judges against whom he appears to have his real grievance, the judges who dismissed his

claims, those judges would also be immune form suit on the basis of their absolutely judicial immunity which is also a well established doctrine. And we cited cases going back to 1872 on that one, Bradley v. Fisher, again a United States Supreme Court case.

In either case, though, I think the court would be well within the bounds of propriety in dismissing this action against this defendant, or even if it interpreted it as an action against the individual judges, it would be proper to dismiss it as to them.

THE COURT: Mr. Reuben.

MR. REUBEN: Your Honor, we also believe that our positions are fully set out in our papers, but to recapitulate briefly, the claims against the law school and its attorneys are all stated under 42 USC Section 1985.

As we pointed out in our moving brief, the amended complaint is deficient as far as stating a cause of action under the statute as far as that is concerned --

THE COURT: Mr. Bell concedes that.

MR. REUBEN: -- in three respects. As I was going to say, your honor, he has conceded the first respect. We do not believe on the facts alleged in the complaint he could remedy that defect which is the failure to allege discriminatory class-based animus. There is nothing in the facts pleaded in this complaint or in any other document that he has already filed in this court or in the

state court that would support such an allegation.

Even if he could support such an allegation, he would not be able to allege with particularity any conspiracy between the law school and its attorneys as required by courts in this circuit.

And in any case, the third respect in which his complaint is deficient, there is no constitutional right to win in state court, which is essentially what he is claiming.

Even if the state court decisions were erroneous, the proper remedy for that is appeal in the state court system which remedy Mr. Bell has taken and has, in his own words, exhausted.

Accordingly there is no possible way this complaint could stay a claim under 1985 against the law school and its attorneys.

THE COURT: But he didn't make a 1985 claim in state court, Mr. Reuben.

MR. REUBEN: That is true, your Honor, but I am not arguing res judicata, I am arguing that the failure to win in state court, which is essentially what is alleged in his complaint in an action between private parties on state law claims does not amount to a constitutional violation, even if, as Mr. Bell alleges, his loss was the result of legal error on the part of the state court.

To hold otherwise would make the federal courts an all purpose forum for review for every

state court decision when a disgruntled litigant doesn't like the result, and that has been the position taken by the federal courts consistently.

I would cite to your Honor, in particular, the case of Moffit v. Commerce Trust Company, 187 F.2d 242 in which the Eighth Circuit dismissed civil rights claims very similar to Mr. Bell's holding that even if state court proceedings were contrary to state law or procured by fraud or perjury they are at most erroneous and there is no jurisdiction in the federal courts to review them by way of a civil rights claim.

THE COURT: All right, Mr. Bell.

MR. BELL: Your Honor, I would like to preface my argument by stating that I am not prepared to argue this motion this morning. I --

THE COURT: I am prepared to rule on it this morning, Mr. Bell.

MR. BELL: Just for the record, when I spoke to Mr. Cott yesterday and he told me this conference was on, I asked him if oral argument was going to be required and he told me no.

THE COURT: It is not required,you may sit down right now, if you wish. It is not required. I have heard argument from the defendants. If you don't want to argue, that is perfectly all right with me.

MR. BELL: Your Honor, I will argue.

First of all, with reference to the state, in my answering papers I think I pointed out to the court that the state is immune under the Eleventh Amendment to this type of suit. I also pointed out to the court that it was an affirmative defense which had to be raised which it did not bother bringing the action but only permitted the state to interpose --

THE COURT: When the Supreme Court says that the Eleventh Amendment is an absolute bar to an action against the stae, that doesn't mean that, is that what you are saying?

MR. BELL: No, what I am saying, your Honor, is the cases that I have cited in my paers have shown that in civil rights cases an action brought even where the state can interpose the defense of immunity, that there are cases which are cited in my papers where the court has found that the court may review the claims brought against the state and although it cannot award monetary damages against the state, if it was injunctive relief, this court would have jurisdiction to do so.

THE COURT: But you are not asking for injunctive relief.

MR. BELL: No, but I am saying the if the court finds my claims are valid even though they cannot award monetary damages it can award counsel fees, and that was the only reference I made to the state.

As far as Mr. Reuben and the law

school is concerned, Mr. Reuben is making certain characterizations which I don't think appears in the record anyplace.

THE COURT: Like what?

MR. BELL: He says I am claiming I had a right to win in the state court which is not my contention at all.

He moved under the principle of collateral estoppel or res judicata which comes under 28 USC 1738, and under that section the federal courts are required to look to state law to ascertain whether the state court would give a preclusive effect to the judgment that they are interposing as a defense.

I have also pointed out that the Court of Appeals of the State of New York specifically stated that attorneys, a law firm, cannot interpose res judicata in a case where they were only counsel. There must be privity between the parties who are raising the judgment as res judicata.

Second of all, if you look at the judgment which they are relying upon, at no point in the proceedings in the state court was any determination ever made of my constitutional rights. That was first raised in the Court of Appeals.

The Court of Appeals held that they found no substantial constitutional question involved because under the statute 5601(b) the party must

make an allegation that some portion of the statute is unconstitutional.

Of course, that was not my claim. My claim was not that the statute was unconstitutional or that the contract law or the law of evidence or the law of summary judgment was unconstitutional. My claim at that point was that it was unconstitutional as it was applied to me.

The Court of Appeals merely refused to hear the case.

An analogy which I think I pointed out to the court was, it was the cases where a party from the federal court make an application to the Supreme Court for certiorari. The Supreme Court has stated in a number of cases that because they deny cert it does not go to the merits of the case, it is just that they don't want to hear that case for whatever reason the court may have.

So the law school is raising res judicata, basically they are saying I am suing on the same claims I had in the state court.

But if the court would look at the complaint that was brought here in the federal court and look at the complaint that was brought in the state court, one of the premises that we must look at is if this court found in my favor in this particular case, would that require, in a state court, would that have required a reversal of the judgment that was made by the state court, which

it would not, because what I am asking this court to consider has nothing to do with the contractual claims which was made against the law school in the state forum.

What I am saying is that the conduct of the attorneys, the conduct of the law school and the conduct of the court is what I am claiming I have been aggrieved at in this proceeding.

I have cited cases in my opposing papers where the federal courts have said that even if the parties raising the principle of res judicata, even if the parties interpose a judgment, this court must look to see whether it should be given a preclusive effect.

In cases where due process, procedural due process appears lacking, then the federal courts do not have to give a preclusive effect to a state judgment.

I have submitted as part of my exhibits the two judgments that were entered, that were filed in the Supreme Court from Justice Smith.

The first one was a draft which was drafted January Blank 1984. This was the time that we brought the motion. The motion was returnable Janyary 11, 1984.

The special term rendered its decision on April 12, 1984. But at the time of the rendering of the decisions both of those drafts went down and were filed.

In the first draft which was dated January Blank 1984, clearly shows that the court had a predisposition to dispose of this case. The contents of that decision shows that first of all the judgme did rely upon evidence which was totally inadmissible. And he made reference to that in the first opinion.

Secondly, on the moving papers, the motion to dismiss, the law school had admitted that it had given me a full scholarship. That issue was not even before the court.

So when Judge Smith wrote that first opinion it is clear that, I don't know what time it would take him to dod so, but if he made a decision in January 1984, I couldn't see any point in him holding it for four months before he rendered a second opinion in April of 1984 in which he deleted all the references to the inadmissible evidence which he considered.

So he started from an assumption that, yes, the scholarship was only for one year which was not evidenced anyplace in the record. As a matter of fact, the record clearly showed that the law school had admitted they had given me a full scholarship upon my acceptance to admission in 1975.

So what I was saying in this particular case, the cases stated that where there is bias, Where a bias can be shown on the part of a judge, regardless of the nature of what that bias is, then proced-

ural due process is not accorded to the party that the decision is rendered against.

THE COURT: Do you have anything further, gentlemen?

MR. VOLKELL: No, your Honor.

MR. REUBEN: No, your Honor.

THE COURT: We will take a short recess.

MR. BELL: Excuse me, your Honor. I advised the court yesterday I was due on calendar call at 9:30 this morning in Supreme Court and this was supposed to start at 9:00. It is now ten minutes to ten. I request that I have permission to run across the street to see if I could submit these papers.

THE COURT: I am going to be in a few minutes rendering the decision here. You have a perfect right to be here or not be be here. Take a short recess.

(Recess)

THE COURT: The motions of both the State of New York and the other defendants to dismiss the complaint are granted, and the complaint is dismissed with prejudice.

With respect to the State of New York, the Eleventh Amendment is a bar to a suit against the State of New York, and that, without more, would be sufficient basis upon which to ground the dismissal.

The plaintiff is seeking retrospective damages from the State of New York and such damages are not available.

Beyond that, however, the plaintiff has attempted to assert constitutional claims by label.

Section 1983 with respect to the state requires more than the invocation of magic words to state a cause of action. One does not state a cause of action simply by stating that the plaintiff was deprived of due process and equal protection.

What is involved here shortly and simply is that the plaintiff asserted legal claims in the state, he lost those legal claims, and he now asserts the fact that he lost those legal claims constituted action by the State of New York depriving him of due process and equal protection.

No matter how it is couched, what plaintiff is seeking is to use civil rights laws to constitute this court a Court of Appeals over what the state court has done.

In count 14 plaintiff alleges that he was deprived of due process and equal protection because he was denied a fair and impartial hearing on his claims against the New York LawSchool with a predisposition to dismiss before due deliberation.

In count 15 the alleged denial of due process and equal protection was because the state failed and refused to apply its contract law in determining whether plaintiff's claims against New York Law School were time barred, and there is also reference to

considering inadmissible evidence.

In count 16 again the plaintiff seems to be asking this court to find that the state court's ruling on the admissibility of evidence or the inadmissibility of evidence has constitutional dimensions.

In count 17 plaintiff alleges the denial of due process and equal protection because the state failed to apply its statutory law with respect to summary judgment in accepting factual allegations by the New York Law School in lieu of documentary evidence and by considering inadmissible evidence in denying the motion for summary judgment.

Those are all questions which may warrant appellate review of a judgment of a trial court. They are certainly not questions which in the context of this case implicate constitutional considerations.

With respect to the claims against the New York Law School, the law firm of Kramer, Levin, Nessen, Kamin & Frankel, Andrea Likwornik and Michael B. Reuben, plaintiff alleges a series of conspiracies, some 13 different conspiracies, apparently, although some of them seem to be duplicative.

Count 2 alleges a conspiracy between the New York Law School, the law firm and Ms. Likwornik to commit a fraud on the state court by arguing the statute of limitations.

Count 7 alleges a conspiracy between New York Law School, the law firm and Mr. Reuben by argu-

ing that the plaintiff's claims were extinguished by the statute of limitations.

There apparently is supposed to be a distinction here between what happened in the trial court and what happened at the appellate level.

Each one of these 13 counts is alleged under 42 USC 1985.

It has been black letter law for many, many years that Section 1985 requires an invidiously discriminatory animus. There is no allegation of any such animus here, and that alone would be grounds to dismiss the first 13 counts of the complaint.

Here, again, the plaintiff lost a legal action in the state; he appealed; the result of the trial court, in Special Term Part 1, was affirmed on appeal; and so now he is attempting to try the matter again in this court.

The conspiracies alleged are: under count 1 a conspiracy to commit fraud on the state courts by introducing into evidence an inadmissible document.

Under count 2, a fraud on the state court by arguing the statute of limitations.

Count 3 simply makes no sense. It alleges a fraud on the state court by arguing that plaintiff's argument relating to the contractual principle of installment payments extending the period of his claims when the defendants knew or should have known that the

argument was not supported by the evidence in their possession.

Count 4 alleges a conspiracy to commit fraud on the state court by arguing that the plaintiff's motion for summary judgment had to be denied because the affidavit of one Dean Bearn showed that the New York Law School disputed the merits of plaintiff's complaint when they knew that the argument was insufficient under state summary judgment law.

Count 5, I assume, is supposed to also be under Section 1985, although it does not say so. It alleges a fraud on the state court by conspiring to argue the admissibility of a grant-in-aid statement on appeal.

Count 6 alleges a fraud on the state court by arguing that the scholarship letter as modified by the grant-in-aid statement supported the New York Law School's allegation that the plaintiff was awarded full tuition for only one year.

I have already discussed count 7 as involving a claim that the fraud was committed by arguing that the plaintiff's claims were extinguished by the statute of limitations.

Count 8 alleges a fraud on the state court by arguing that the plaintiff's motion for summary judgment was moot and premature.

Count 9 alleges a conspiracy to commit a fraud on the state court by arguing that the

scholarship letter was not a contract because it was not supported by consideration by plaintiff.

Count 10 alleges a conspiracy to commit fraud on the state court by arguing that the plaintiff did not accept New York Law School's offer of scholarship.

Count 11 makes no sense. It alleges that the defendants perpetrated a fraud on the state court by conspiring illegally to argue that had plaintiff's claims not been time barred, and New York Law School had answered and had asserted no additional defenses, that summary judgment would be justified on the ground that allegations set forth in Dean Bearn's affidavit would have been sufficient to defeat said motion for summary judgment when defendants knew that said argument is controverted by the law of summary judgment which specifically states that documentary evidence must be produced, not mere allegations of fact or law.

Count 12 alleges a conspiracy to commit fraud on the state court by arguing that the plaintiff conceded his personal damages were extinguished by the statute of limitations when he only conceded that his personal damages were time barred.

Count 13 alleges a fraud on the state court or a conspiracy to commit fraud on the state court by arguing that Special Term did not exercise its option to entertain plaintiff's motion for summary judg-

ment.

What we have in this complaint is an invocation of provisions of law which are designed to make it possible for citizens to assert and prove constitutional claims in a situation where no legitimate constitutional claim exists.

Plaintiff is purely and simply a disappointed state litigant.

The commencement of this law suit quite possibly constituted harassment. The continuation of the law suit after plaintiff was very directly instructed as to the outrageous nature of the complaint certainly constitutes harassment.

This complaint is a pleading which on its face has no merit, and there is no way that the amendment process could possibly be used to pump merit into it.

In light of the fact that the plaintiff was given clear warning of the possible consequences of persisting in this litigation, I award attorney's fees to the defendants with respect to this motion to dismiss. These attorney's fees will run, therefore, from the time work first began on the preparation of those motions to dismiss through the present.

Defendants are instructed within two weeks of this date to submit affidavits with respect to their requested attorney's fees and the plaintiff is given one week to file any responsive papers with respect

to those affidavits.

Is there anything further?

MR. VOLKELL: No, your Honor.

MR. REUBEN: No, your Honor.

MR BELL: No, your Honor.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---x

JOHN B. BELL,

Plaintiff,

-against-

NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION, CHEMICAL BANK and NEW YORK LAW SCHOOL,

Defendants.

---x

To the above named Defendants

YOUR ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, November 15, 1983

JOHN B. BELL
Plaintiff
205 West 79th Street
New York, NY 10024
1(212) 580-8860

Defendant's Address

State Campus
99 Washington Avenue
Albany, New York

52 Worth Street
New York, NY 10013

55 Water Street
New York, NY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---x

JOHN B. BELL,

Plaintiff,

-against-

NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION, CHEMICAL BANK and NEW YORK LAW SCHOOL,

Defendants.

---x

VERIFIED COMPLAINT

Plaintiff, JOHN B. BELL, proceeding Pro Se and complaining of the defendants, respectfully shows the Court and alleges:

1. That at all times hereinafter mentioned plaintiff was, and still is, a resident of the State of New York and resides at 205 West 79th Street, New York, New York.

2. That upon information and belief, defendant NEW YORK HIGHER EDUCATION ASSISTANCE

CORPORATION is a State agency engaged in assisting students in securing higher education goals through the guaranteeing of educational loans through various banking institutions.

3. That upon information and belief, defendant CHEMICAL BANK is a banking institution chartered by, and existing by virtue of the laws of the State of New York.

4. That upon information and belief, defendant NEW YORK LAW SCHOOL is an institution of higher education devoted to the teaching of the law, chartered by, and existing by virtue of the laws of the State of New York.

AS AND FOR A FIRST CAUSE OF ACTION

5. That pursuant to the program of loans established by NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION (NYHEAC), plaintiff entereed into an agreement with CHEMICAL BANK (CHEMICAL) whereby CHEMICAL undertook to loan plaintiff specifically approved sums of money for the

purpose of assisting plaintiff to defray the expenses of securing higher educational goals.

6. Pursuant to said agreement, plaintiff would receive an approved sum of money each year for educational purposes which sums have ranged from $2,500.00 to $5,000.00 per year, depending upon the student's status of either part-time or full-time and the year in which said loan was made.

7. Pursuant to said agreements, CHEMICAL was to provide plaintiff with loans in accordance with approved standards and said loans were guaranteed by NYHEAC. Additionally, plaintiff was to receive said loans while pursuing higher educational goals and was not required to make any payments of interest or any repayments on the principal loan until nine (9) months after leaving school.

8. After graduating from Columbia University in June, 1975, plaintiff was accepted by New York Law School (NYLS) and commenced his legal there in September, 1975, allegedly upon a Full Scholarship

offered by NYLS and continued contracting with CHEMICAL for student loans.

9. Upon entering NYLS, plaintiff was in dire need of funds for living expenses and educational material for the assigned courses. Upon making an application to NYLS for an emergency loan pending the disbursement of CHEMICAL's student loan, plaintiff was advised that NYLS did not have an emergency loan program and recommended that plaintiff transer to the Evening Division of the school and find employment to help defray his living expenses. Upon recommendation of NYLS, plaintiff transferred to the Evening Division and upon Registration for the Spring Term of the 1975-76 school year, was informed by NYLS that his transferring to the Evening Division forfeited the full scholarship given him. At the time NYLS made the recommendation to transfer, nothing was said regarding plaintiff's full-scholarship, nor did NYLS inform pliantiff that the transfer would forfeit the scholarship.

10. Plaintiff secured employment with COVINGTON, HOWARD, HAGOOD & HOLLAND, ESQS., then located at 10 Columbus Circle at a weekly salary of $140.00 per week. With the assistance of NYHEAC loans, plaintiff managed to complete two years of the four year Evening Division Program. Due to financial difficulties, plaintiff was forced to take a Leave of Absence for the 1977-78 school year.

11. Plaintiff was readmitted for the 1978-79 school year for the Spring Term, 1979. Plaintiff had applied for Readmission for the Fall Term, 1978 but because of the financial difficulties experienced in the 1976-77 school year, plaintiff's academic standing was put in issue when his Cumulative Average was only 1.9. Since plaintiff did not maintain the 2.0 Cumulative Average, he was required to meet with the Academic Standing Committee prior to readmission.

12. Plantiff met with the Academic Standing Committee to explain his circumstances. After said meeting, the members of the committee voted to re-

admit plaintiff to school but recommended that since plaintiff's financial problems were far from being resolved, that plaintiff extend his Leave of absence until the Spring Term, 1979. Plaintiff so extended the leave.

13. During plaintiff's Leave of Absence, he continued to receive Status Report inquiries from NYHEAC and duly filled in the requested information and forwarded them to NYLS for completion and submission to NYHEAC. During the school year, 1978-79, plaintiff received such a Status Report inquiry from NYHEAC, completed same and forwarded it to NYLS for processing. During said period, plaintiff received another Status Report captioned SECOND NOTICE, completed same and frowarded it to NYLS for processing. Upon receipt of another Status Report captioned THIRD NOTICE, plaintiff completed same and delivered it to NYLS personally, and was assured that the previous reports had been properly handled and that the situation would be taken care of.

14. Plaintiff was readmitted to NYLS for the

Spring Term, 1979 and duly filed an application for a NYHEAC Loan with CHEMICAL for the 1979-80 school year. On or about August, 1979, plaintiff was advised by CHEMICAL that his NYHEAC Loan application would not be processed until plaintiff paid interest thereon in the sum of approximately $540.00. CHEMICAL further advised plaintiff that if said sum was not received within a period of approximately 10 days, that CHEMICAL would submit the loan to NYHEAC for payment.

15. Plaintiff contacted CHEMICAL in reference to the loan and advised it that pursuant to the agreement between the parties, plaintiff was not required to make any payments on said loan until nine (9) months after leaving school. CHEMICAL advised plaintiff that he had left school and that plaintiff would have to pay the interest on the loan or it would be submitted to NYHEAC for payment. Plaintiff contacted NYHEAC and related to it the conversations with, and the demands of, CHEMICAL. Plaintiff fur-

ther questioned NYHEAC in reference to the standard clause in the Loan Agreement which state that a borrower is not required to make any repayments until nine (9) months after leaving school. NYHEAC advised plaintiff that there was nothing it could do, that if CHEMICAL submitted the loan, they would have to pay it.

16. Plaintiff contacted CHEMICAL again and informed it that plaintiff would not be able to pay the sum requested within the time given and asked if CHEMICAL would process the Loan Application and disburse the loan to plaintiff after payment of the interest had been made. CHEMICAL replied in the negative and again informed plaintiff if the interest was not received with the time alloted, the loan would be submitted for payment. The loan was submitted for payment.

17. Due to the submission of plaintiff's loan for payment, plaintiff was unable to attend school for the 1979-80 school year and effectively, withdrew from school. Plaintiff filed his Certificate of Clerkship with

the Board of Law Examiners on April 3, 1980.

18. Predicated upon the foregoing, plaintiff respectfully alleges that CHEMICAL breached the Loan Agreement between the parties, in that CHEMICAL did wrongfully submit plaintiff's loan to NYHEAC for payment in violation of said Agreement. Plaintiff further respectfully alleges that pursuant to said Agreement, plaintiff was not required to make any payments on the loan until nine (9) months after plaintiff left school and plaintiff did not leave school within the meaning of the terms of the Agreement. CHEMICAL's breach of the Loan Agreement effectively delayed the completion of plaintiff's Legal Education for a period of two or more years, depriving plaintiff of increased earning, career opportunities and inflicting great emotional distress due to theuncertainty of plaintiff's future career goals, damaging plaintiff in teh sum of $2,000,000.00.

AS AND FOR A SECOND CAUSE OF ACTION

19. Plaintiff repeats and realleges each and

every allegation set forth in paragraphs 1 through 18 with the same force and effect as if set forth herein again in full.

20. Plaintiff respectfully alleges that NYHEAC, a party to said agreement between plaintiff and CHEMICAL, by virtue of its status as a guarantor of the loans, breached the agreement in that it failed to pay the interest on the loans to CHEMICAL as required and failed and refused to protect the interests of plaintiff under the Agreement by paying the loan in violation of the terms thereof. Plaintiff further respectfully alleges that NYHEAC's wrongful payment of his loan to CHEMICAL effectively deprived him of necessary funds to complete his Legal Education, delayed the completion of his Legal Education for a period of two or more years, depriving plaintiff of increased earnings, career opportunities and inflicting great emotional distress due to the uncertainty of plaintliff's future career goals, damaging plaintiff in the sum of $2,000,000.00.

AS AND FOR A THIRD CAUSE OF ACTION

21. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 18 with the same force and effect as if set forth herein again in full.

22. Plaintiff respectfully alleges that NYLS breached its contract with plaintiff relating to the full-scholarship offered plaintiff to attend its school, in that NYLS did knowingly and wilfully advise plaintiff to transfer to its Evening Division and did negligently fail and refuse to advise plaintiff of the loss of said full-scholarship if plaintiff transferred as advised, damaging plaintiff in the sum of $22,000.00.

AS AND FOR A FOURTH CAUSE OF ACTION

23. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 18 with the same force and effect as if set forth herein again in full.

24. Plaintiff respectfully alleges that NYLS did negligently fail to perform the duties owed plain-

tiff in reference to the timely completion and filing of the Status Report inquiries received from NYHEAC which explained plaintiff's status in reference to his Educational Loans. Plaintiff further respectfully alleges that interest payable by plaintiff on said loan, and the subsequent submission of said loan for repayment, was the direct result of NYLS' negligent conduct. Said negligent conduct effectively deprived plaintiff of necessary funds to complete his Legal Education, delayed the completion of his Legal Education for a period of two or more years, depriving plaintiff of increased earnings, career opportunities and inflicting great emotional distress due to the uncertainty of plaintiff's future career goals, damaging plaintiff in the sum of $2,000,000.00.

WHEREFORE, plaintiff demands judgment against the defendants as follows:

1. in the sum of $2,000,000.00 on the First Cause of action;

2. in the sum of $2,000,000.00 on the Second Cause of action;

3. in the sum of $22,000.00 on the Third Cause of Action;

4. in the sum of $2,000,000.00 on the Fourth Cause of Action,

and for such other, further and different relief as to the Court may seem just and proper in the premises.

DATED: NEW YORK, NEW YORK
November 7, 1983

JOHN B. BELL
Plaintiff, Pro Se
205 West 79th Street
New York, NY 10024
1(212) 580-8860

VERIFICATION

On the 7th day of November, 1983, before me personally came John B. Bell, known to me and to me known to be the plaintiff in the above captioned action and stated that he has read the foregoing Verified Complaint, knows the contents thereof and that the same is true except as to those matters alleged to be upon information and belief and as to those matters, he believes them to be true.

/s/
Notary Public

At a term of the Appellate Division of the Supreme Court held in and the First Judicial Department in the County of New York, on December 6, 1984

Present —Hon. Theodore R. Kupferman, P.J.
Leonard H. Sandler,
Joseph P. Sullivan
David Ross, Justices.

John B. Bell,

Plaintiff-Appellant,

-against-

New York Higher Education Assistance Corporation and Chemical Bank, 21573

Defendants,

-and-

New York Law School,

Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County (George Smith, J.), entered on May 14, 1984, which dismissed and severed plaintiff's complaint as to defendant-respondent, and said

appeal having been argued by John B. Bell, appellant pro se, and by Michael B. Reuben of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Respondent shall recover of appellant $75 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUSANT

Clerk.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirty day of April, A.D. 1985

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

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1 Mo. No. 443 SSD 53
John B. Bell,

Appellant,

vs.

New York Higher Education Assistance Corporation, Chemical Bank,

Defendants,

and New York Law School,

Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitu-

tional question is directly involved.

/s/
Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifth day of July A.D. 1985

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

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1 Mo. No. 544
John B. Bell,

Appellant,

vs.

New York Higher Education Assistance Corporation, Chemical Bank, Defendants, and New York Law School,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/
Kathryn C. Brown
Deputy Clerk of the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN B. BELL,

Plaintiff,

-against-

THE STATE OF NEW YORK - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS. - ANDREA LIKWORNIK, individually - and MICHAEL B. REUBEN, individually,

Defendants.

AMENDED VERIFIED COMPLAINT

Plaintiff, proceeding pro se, as and for his complaint against the defendants, alleges as follows:

1. This is an action against the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., ANDREA LIKWORNIK and MICHAEL B. REUBEN, to recover damages for violation of plaintiff's Civil Rights under 42 U.S.C. 1985 and against the defendant, THE STATE OF NEW YORK, to recover damages for violation of plaintiff's constitu-

tional rilghts under the 14th Amendment to the United States Constitution and pursuant to 42 U.S.C. 1983.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction in this action pursuant to 28 U.S.C. 1331(a) because the matter in controversey exceeds the sum and value of $10,000.00 and arises under the Constitution and laws of the United States.

3. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. 1343(3) because there are civil claims seeking damages to redress a deprivation of rights, privileges and immunities secured by the Constitution of the United States.

4. Venue in this district is proper pursuant to 28 U.S.C. 1391(b) and (c) because the claims arise in this district.

THE PARTIES

5. The plaintiff, JOHN B. BELL, is a resident of the State of New York and resides at 205 West 79th

Street, New York, New York.

6. The defendant, THE STATE OF NEW YORK, is a sovereign state and a political subdivision of the United States of America, with its seat of government in Albany, New York.

7. Upon information and belief the defendant, NEW YORK LAW SCHOOL, is an educational corporation duly chartered by the New York State Department of Education, engages in the business of providing legal education to students and has its principal offices located at 57 Worth Street, New York, New York.

8. The defendant, KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., is a law partnership providing legal services to the public, with its principal offices located at 919 Third Avenue, New York, New York.

9. The defendant, ANDREA LIKWORNIK, at all times relevant hereto, was an associate of the defendant, KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., assigned to defend the action against NEW YORK

LAW SCHOOL by the plaintiff herein in Supreme Court, New York County, with an office located at 919 Third Avenue, New York, New York.

10. The defendant, MICHAEL B. REUBEN, is an associate of the defendant, KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., who succeeded the said ANDREA LIKWORNIK in defending the defendant, NEW YORK LAW SCHOOL, on the appeal of the dismissal of plaintiff's claims, in the Appellate Division, First Department and in the Court of Appeals, with an office located at 919 Third Avenue, New york, New York.

BACKGROUND

11. By a letter dated July 22, 1975, plaintiff was awarded a "full-tuition" scholarship to attend New York Law School (hereinafter "NYLS") and enrolled in said School under the scholarship for the Fall Term of 1975. Under the terms of the agreement, NYLS was to provide plaintiff with a full tuition scholarship if plaintiff attened its School. As aforesaid, plaintiff did enroll in NYLS and his enrollment constituted an accept-

ance of the offer and resulted in a valid contract.

12. During the Fall Term of 1975, plaintiff experienced financial difficulties due to the delay in the disbursement of his New York State Higher Education Assistance Corporation (hereinafter "NYHEAC") Guaranteed Student Loan by the lender bank, Chemical Bank. Plaintiff approached NYLS in an attempt to secure an Emergency Loan to permit him to purchase required textbooks and defray his day-to-day expenses until the disbursement of his NYHEAC loan. NYLS informed plaintiff that it did not have an Emergency Loan Program, further informing him that he could either rough it out or transfer to its Evening Division which would permit him to work full-time during the day and thus help to alleviate his financial problems. NYLS cautioned plaintiff that he had less than two weeks to make a decision, as he would not be able to transfer to the Evening Division after said time.

13. Plaintiff, in reliance upon the advice and counsel of NYLS, agreed to transfer to the Evening Di-

vision and hisl application therefor was approved. Plaintiff secured employment and attended NYLS' Evening Division for the rest of said semester. However, upon attempting to register for the Spring Term of 1976, plaintiff was advised that he had lost his scholarship by transferring to the Evening Division. His protests, and reminder to NYLS that said transfer was made upon its advice and counsel and that it at no time advised him that such a transfer would impair his scholarship, fell upon deaf ears and plaintiff's scholarship was revoked.

14. Without said scholarship aid, and with employment which just about covered his basic needs, plaintiff's financial difficulties increased until plaintiff was forced to take a leave ofabsence for the 1977-78 School Year. Plaintiff sought to be readmitted to NYLS for the Fall Term of 1978 but was advised by NYLS' Committee on Academic Standing that he should wait and seek readmission for the Spring Term of 1979, which would give him additional time in which to get his financial affairs

in order. Plaintiff acquiesced in this matter and delayed the continuation of his legal studies until the Spring Term of 1979. Plaintiff was readmitted for the Spring Term of 1979.

15. During plaintiff's leave of absence, he continued to receive, fill-out adn forward to NYLS, Status Reports required by NYHEAC relating to students' current school status. Plaintiff received Second and Third Notices requesting that his Status Reports be submitted to NYHEAC. Plaintiff contacted NYLS' administrative offices with reference to said Reports and was informed that NYLS had completed same and forwarded them to NYHEAC and that the additional notices he received were probably due to computer error in NYHEAC's offices.

16. Plaintiff submitted his application for his NYHEAC loan to his lender bank and was subsequently informed that the application could not be processed because plaintiff's loan had been placed in default due to the fact that he had "left school". Plaintiff advised the lender bank that he was currently in school and further

negotiations among plaintiff, lender bank and NYHEAC proved fruitless and his education loans were terminated.

17. Plaintiff was unable to continue his legal studies and filed a Certificate of Clerkship in April of 1980. Due to a mistake in the handling of his personnel file, the law firm that employed him failed to give him the proper training for his Clerkship and in March, 1981, advised him that they could not give him the requisite letter for the New York State Board of Law Examiners to authorize his taking of the New York State Bar Examination. His employers suggested that he return to law school and complete same at their expense. Plaintiff was readmitted to NYLS for the Fall Term of 1981 and graduated in June of 1983.

18. Plaintiff commenced an action against NYHEAC, Chemical Bank and New York Law School in the Supreme Court, New York County, under Index Number 28103/83. NYHEAC defaulted in answering and a default judgment was entered against it and after an Inquest with Jury, plaintiff was awarded $80,000.00 in

compensatory and personal damages. NYLS moved to dismiss the action against it on the ground that the action was barred by the Statute of Limitations and plaintiff moved for summary judgment. NYLS' motion was granted and the action against Chemical Bank is still pending.

19. On its motion to dismiss, NYLS alleged that the action was time-barred as plaintiff's cause of action accrued no later than the Spring Term of 1976, when plaintiff was first denied his scholarship. On his cross-motion for summary judgment, plaintiff argued to Special Term, Part I (GEORGE BUNDY SMITH, J.) that under applicable Contract Law, NYLS breached its contract with plaintiff in each and every semester that it failed to provide him with the scholarship and that the Statute of Limitations began running with each successive breach and therefore, his entire claim was not extinguished by the Statute of Limitations. Plaintiff further argued that since his entire claim was not time-barred, and since NYLS admitted its obligations under the contract, that summary judgment should be entered in favor of plain-

tiff for that portion of his claims which were not time-barred.

20. After submission of plaintiff's cross-motion for summary judgment, and for the first time in the case, NYLS alleged that plaintiff's "full tuition" scholarship was not a "full tuition" scholarship, but only a "full tuition" scholarship for one year. In support of its allegation, NYLS introduced into evidence a Grant-In-Aid Statement which purported to modify the written Scholarship Letter of July 22, 1975. However, said Statement was neither dated nor executed by plaintiff and clearly inadmissible evidence. NYLS, in an attempt to capitalize on the fact that it used a Form Letter to make the award to plaintiff, urged taht said Scholarship Letter be construed as granting plaintiff a full tuition scholarship for the 1976-76 School Year, a construction which could not be reasonably inferred either from the letter itself or NYLS' actions subsequent to the awarding of said scholarship.

21. It is clear from the circumstances that said Grant-In-Aid Statement is used to award "partial" scholar-

ships and the Form Scholarship Letter is so drafted that the the dollar amount of the partial scholarship can be inserted. The modifying language in the Grant-In-Aid Statement is only applicable to those receiving partial scholarship and who must, as a condition of the scholarship awarded, sing the Grant-In-Aid Statement before the award can be disbursed. Plaintiff never received a copy of said Statement, nor was he ever required to sign same. Plaintiff argued that said Statement was inadmissible as evidence and could not be used to construe the amount of the acholarship award or to modify the clear terms of the agreement. Plaintiff further argued that under applicable Contract Law, if the Scholarship Letter was ambiguous as to what was awarded plaintiff, then the ambiugity had to be construed against the party who drafted it, To Wit: NYLS.

22. Upon the granting of NYLS' motion to dismiss the complaint against it, plaintiff went to the Office of the Clerk of Special Term, Part I, to obtain a copy of Justice Smith's decision, copied same and pre-

pared to file his Notice of Appeal upon service of the Settle Order submitted for Justice Smith's signature. Upon service of NLYS' Notice of Settlement, with Justice Smith's decision annexed thereto, plaintiff discovered that the decision served, dated April 22, 1984, was not the same decision which he had obtained from the Office of the Clerk of Special Term, Part I. Plaintiff had mistakenly copies a "draft" dated January_____ 1984, which clearly showed that Justice Smith had considered the Grant-In-Aid Statement in reaching his determination that plaintiff's full tuition scholarship was only for one year. Justice Smith stated:

> "... Moreover, since plaintilff contends he never signed the 'grant-in-aid' form which he characterizes as 'a prerequisite to the granting of said type scholarship,' and which according to the letter (dated July 22, 1975, supra) announcing the award of the scholarship, appears to be a condition precedent to the award of the scholarship, there may not have been , in fact, any contract upon which to base the claim in the third cause of action."

23. More significant than the language of Justice Smith which clearly demonstrates the consideration of inadmissible evidence, is the date of the "draft", JANUARY _____1984. This is significant in that the motions, to dismiss the complaint and the cross-motion for summary judgment, were returnable January 11, 1984. Justice Smith's final decision was rendered on April 12, 1984, or some ninety (90) days after the submission of the motions and in said decision there is no reference to the Grant-In-Aid Statement at all. In lieu thereof, Justice Smith merely assumes the validity of NYLS's argument on the critical issue, stating:

> "... This theory is contradicted by the terms of the scholarship award which clearly indicates that the award of 'full tuition' was 'to be used for the present (1975-76) academic year'...". (emphasis added)

The dates of the respective decisions, and the significant difference in the criteria therefore, would indicate that Justice Smith cedided the motions in favor of NYLS and against plaintiff well before due deliberation thereon was

had, evidencing a denial of an impartial hearing on plaintiff's motion and a deprivation of plaintiff's constitutional rights to Due Process and Equal Protection of the law.

24. Similarly, Justice Smith seemed to have failed to apply applicable Summary Judgment Law in denying plaintiff's motion for summary judgment, the party opposing the motion must, through the introduction of "documentary evidence", show that there is a material triable issue of fact and that conclusory statements of fact or law are insufficient. Aside from the affidavit of Assistant Dean Bearn, the only documentary "evidence" produced by NYLS was the inadmissible Grant-In-Aid Statement, and therefore, plaintiff's motion for summary judgment should have been granted. NYLS had the opportunity to submit the Scholarship Committee minutes which would have clearly established what plaintiff was awarded and/or it had the opportunity to submit an affidavit by Dean E. Donald Shapiro who could have given a first-hand account of what plaintiff was awarded by the Scholarship Letter of July 22, 1975. NYLS' reliance on the inadmissible

Grant-In-Aid Statement on such a motion as one for summary judgment would seem negligent under the circumstances and Justice Smith's reliance thereon in denying plaintiff's motion for summary judgment constituted a violation of plaintiff's constitutional right to the Equal Protection of the Law..

25. On appeal to the Appellate Division, First Department, the decision of Special Term, Part I, was affirmed without opinion. Plailntiff's appeal as of right under the Civil Practice Law & Rules, Section 5601(b)(1), constitutional grounds, was dismissed sua sponte on the ground that no substantial constitutional issues had been raised and plaintiff's subsequent motion for permission to appeal to said Court was denied. Plaintiff has exhausted all ofhis State remedies.

COUNT I

26. Plaintiff respectfully alleges that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and ANDREA LIKWORNIK, did knowingly, wilfully and deliberately

conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said defendants did knowingly, wilfully and deliberately perpetrate a traud upon the State Court by conspiring to introduce in to evidence a document which they knew or should have known, was inadmissible under the Law of Evidence, for the sole purpose of interfering with the judicial machinery performing the task of impartial adjudication, damaging plaintiff in a sum to be determined on the trial.

COUNT II

27. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 Through 25 with the same force and effect as if set forth herein again in full.

28. Plaintiff respectfully alleges that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and ANDREA LIKWORNIK, did knowingly, wilfully and deliberately conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said

defendants did knowingly, wilfully and deliberately perpetrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that plaintiff's clalims against NYLS were barred by the Statute of Limitations when said defendants knew, or should have known, that said argument was not supportable by the evidence in their possession at the time, damaging plaintiff in a sum to be determined on the trial.

COUNT III

29. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

30. Plaintiff respectfully alleges that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and ANDREA LIKWORNIK, did knowingly, wilfully and deliberately conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said defendants did knowingly, wilfully and deliberately per-

petrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that plaintiff's argument relating to the contractual principle of installment payments extending the period of his claims, when said defendants knew, or should have known, that said argument was not supported by the evidence in their possession at the time, damaging plaintiff in a sum to be determined on the trial.

COUNT IV

31. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

32. Plaintiff respectfully alleges that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and MICHAEL B. REUBEN, did knowingly, wilfully and deliberately perpetrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that plaintiff's motion for summary judgment

had to be denied because the affidavit of Dean Bearn "showed" that NYLS disputed the merits of plaintiff's complaint, when said defendants knew, or should have known, that said argument was clearly insufficient under applicable Summary Judgment Law, damaging plaintiff in a sum to be determined on the trial.

COUNT V

33. Plaintiff repeats and realleges each and every allegation set forth in Paragraph 1 through 25 with the same force and effect as if set forth herein again in full.

34. Plaintiff respectfully alleges that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and MICHAEL B. REUBEN, did knowingly, wilfully and deliberately perpetrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, the admissibility of the Grant-In-Aid Statement on the appeal, when said defendants knew, or should have known, that said argument was unsupportalbe and

directly controverted by the Law of Evidence, damaging plaintiff in a sum to be determined on the trial.

COUNT VI

35. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

36. Plaintiff respectfully alleges that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and MICHAEL B. REUBEN, did knowingly, wilfully and deliberately conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said defendants did knowingly, wilfully and deliberately perpetrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that the Scholarship Letter, as modified by the Grant-In-Aid Statement, supported NYLS' allegation that plaintiff was awarded a "full tuition" scholarship only for one year, when said defendants knew, or should have known, that said argu-

ment was not supported by the evidence in their possession at the time and that predicated upon the Scholarship Letter and NYLS' actions subsequent thereto, the only reasonable inference to be drawn was that plaintiff was awarded a full tuition scholarship, damaging plaintiff in a sum to be determined on the trial.

COUNT VII

37. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

38. Plaintiff respectfully alleges that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and MICHAEL B. REUBEN, did knowingly, wilfully and deliberately conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said defendants did knowingly, wilfully and deliberately perpetrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that plain-

tiff's claims were entirely extinguished by the Statute of Limitations, when defendants knew, or should have known, that said argument was not supported by the evidence in their possession at the time, damaging plaintiff in a sum to be determined on the trial.

COUNT VIII

39. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

40. Plaintiff respectfully alleges that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and MICHAEL B. REUBEN, did knowingly, wilfully and deliberately conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said defendants did knowingly, wilfully and deliberately perpetrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that plaintiff's motion for summary judgment was moot and pre-

mature, when said defendants knew, or should have known that said arguments were refuted by the fact that Justice Smith decided plaintiff's motion for summary judgment and that under CPLR, section 3211(c), joinder of issue is not a prerequisite before such a motion could be made, damaging plaintiff in a sum to be determined on the trial.

COUNT IX

41. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

42. Plaintiff respectfully alleges that defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and MICHAEL B. REUBEN, did knowingly, wilfully and deliberately conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said defendants did knowingly, wilfully and deliberately perpetrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that plain-

the Scholarship Letter was not a contract because it was not support by consideration by plaintiff, when said defendants knew, or should have known, that said argument is directly refuted by Contract Law relating to Executory Contracts and that under said principle, acceptance of the offer by enrolling in NYLS constituted good consideration and created a valid contract, damaging plaintiff in a sum to be determined on the trial.

COUNT X

43. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

44. Plaintiff respectfully alleges that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN,NESSEN, KAMIN & FRANKEL, ESQS., and MICHAEL B. REUBEN, did knowingly, wilfully and deliberately conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said defendants did knowingly, wilfully and deliberately per-

petrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that plaintiff did not accept NYLS' offer of scholarship, when said defendants knew, or should have known, that said argument could not be supported in view of the fact that plaintiff enrolled in NYLS on said scholarship and NYLS never denied that a valid contract existed between itself and plaintiff, damaging plaintiff in a sum to be determined on the trial.

COUNT XI

45. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

46. Plaintiff respectfully contends that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and MICHAEL B. REUBEN, did knowingly, wilfully and deliberately conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said de-

fendants did knowingly, wilfully and deliberately perpetrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that had plaintiff's claims not been time-barred, and NYLS had answered and had asserted no additional defenses, that summary judgment would (not) be justified on the ground that allegations set forth in Dean Bearns affidavit would have been sufficient to defeat said motion for summary judgment, when said defendants knew, or should have known, that said argument is controverted by the Law of Summary Judgment which specifically states that documentary evidence must be produced, not mere allegations of fact or law, damaging plaintiff in a sum to be determined on the trial.

COUNT XII

47. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

48. Plaintiff respectfully alleges that the de-

fendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and MICHAEL B. REUBEN, did knowingly, wilfully and deliberately conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said defendants did knowingly, wilfully and deliberately perpetrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that plaintiff conceded that his personal damages were extinguished by the Statute of Limitations, when said defendants knew, or should have known, that plaintiff only conceded that his personal damages, arising under his claim relating to NYLS' failure to complete and forward his Status Reports to NYHEAC, were time-barred adn that plaintiff specifically reserved his claims to personal damages that trached NYLS' breach of contract such as emotional distress, compensatory damages and loss of earnings, damaging plaintiff in a sum to be determined on the trial.

COUNT XIII

49. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

50. Plaintiff respectfully alleges that the defendants, NEW YORK LAW SCHOOL - KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., and MICHAEL B. REUBEN, did knowingly, wilfully and deliberately conspire to deprive plaintiff of his Civil Rights in violation of 42 U.S.C. 1985, in that said defendants did knowingly, wilfully and deliberately perpetrate a fraud upon the State Court by conspiring to illegally argue, lacking good-faith therefor, that Special Term did not exercise its option under CPLR, 3211(c) to entertain plaintiff's motion for summary judgment, when said defendants knew, or should have known, that Special Term did exercise its option and upon said exercise, denied plaintiff's motion for summary judgment predicated upon defendant's introduc-

tion of inadmissible evidence for the sole purpose of interfering with judicial machinery performing the task of impartial adjudication, damaging plaintiff in a sum to be determined on the trial.

COUNT XIV

51. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

52. Plaintiff respectfully alleges that the defendant, THE STATE OF NEW YORK, through its agents and/or employees and in derogation of plailntiff's constitutional rights, did knowingly, wilfully and deliberately deprive plaintiff of Due Process and Equal Protection of the law secured by the 14th Amendment to the United States Constitution and in violation of 42 U.S.C. 1983, in that said defendant denied plaintiff a fair and impartial hearing on his claims against NYLS, demonstrating a predisposition to dismiss plaintiff's claims before due deliberation thereon could be had, damaging plaintiff in a sum

to be determined on the trial.

COUNT VX

53. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

54. Plaintiff respectfully alleges that the defendant, THE STATE OF NEW YORK, through its agents and/or employees and in derogation of plaintiff's constitutional rights, did knowingly, wilfully and deliberately deprive plaintiff of Due Process and Equal Protection of the Law secured by the 14th Amendment to the United States Constitution and in violation of 42 U.S.C. 1983, in that said defendant failed and refused to apply its applicable Contract Law in ascertaining whether or not plaintiff's claims against NYLS were time-barred, by considering inadmissible evidence to modify the terms of the contract, damaging plaintiff in a sum to be determined on the trial.

COUNT XVI

55. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

56. Plaintiff respectfully alleges that the defendant, THE STATE OF NEW YORK, through its agents and/or employees and in derogation of plaintiff's constitutional rights, did knowingly, wilfully and deliberately deprive plaintiff of Due Process and Equal Protection of the Law secured by the 14th Amendment to the United States Constitution and in violation of 42 U.S.C. 1983, in that said defendant failed and refused to apply its applicable Laws of Evidence to ascertain the admissibility of documentary evidence used to modify the terms of the written agreement between plaintiff and NYLS and by considering inadmissible evidence to modiy the terms of the contract, damaging plaintiff in a sum to be determined on the trial.

COUNT XVII

57. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 25 with the same force and effect as if set forth herein again in full.

58. Plaintiff respectfully alleges that the defendant, THE STATE OF NEW YORK, through its agents and /or employees and in derogation of plaintiff's constitutional rights, did knowingly, wilfully and deliberately deprive plaintiff of Due Process and Equal Protection of the Law secured by the 14th Amendment to the United States Constitution and in violation of 42 U.S.C. 1983, in that said defendant failed and refused to apply its applicable Statutory Law pertaining to Summary Judgment in accepting factual allegations made by NYLS in lieu of documentary evidence as required by the Law of Summary Judgment and by considering inadmissible evidence in lieu of admissible evidence in denying plaintiff's motion for summary judgment, damaging plaintiff in a sum to be determined on the trial.

WHEREFORE, plaintiff demand jdugment against the defendants as follows:

a) on Count I, in a sum to be determined on the trial;

b) on Count II, in a sum to be determined on the trial;

c) on Count III, in a sum to be determined on the trial;

d) on Count IV, in a sum to be determined on the trial;

e) on Count V, in a sum to be determined on the trial;

f) on Count VI, in a sum to be determined on the trial;

g) on Count VII, in a sum to be determined on the trial;

h) on Count VIII, in a sum to be determined on the trial;

i) on Count IX, in a sum to be determined on the trial;

j) on Count X, in a sum to be determined on the trial;

k) on Count XI, in a sum to be determined on the trial;

l) on Count XII, in a sum to be determined on the trial;

m) on Count XIII, in a sum to be determined on the trial;

n) on Count XIV, in a sum to be determined on the trial;

o) on Count XV, in a sum to be determined on the trial;

p) on Count XVI, in a sum to be determined on the trial;

q) on Count XVII, in a sum to be determined on the trial;

r) costs, disbrusements and approriate counsel fees, and such other further and different relief as to the Court may be just and proper in the premises..

DATED: NEW YORK, NEW YORK
August 6, 1985

/s/

JOHN B. BELL
Plaintiff, Pro Se
205 West 79th Street
New York, NY 10024
1(212) 334-9664

No. 86-235

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

JOHN B. BELL,

Petitioner,

—vs.—

THE STATE OF NEW YORK, NEW YORK LAW SCHOOL, KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., MICHAEL B. REUBEN, individually,

Respondents,

—and—

ANDREA LIKWORNIK, individually.

BRIEF OF RESPONDENTS NEW YORK LAW SCHOOL, KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, AND MICHAEL B. REUBEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

No. 86-235

JOHN B. BELL,

Petitioner,

- vs. -

THE STATE OF NEW YORK, NEW YORK LAW SCHOOL, KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL, ESQS., MICHAEL B. REUBEN, individually,

Respondents,

- and -

ANDREA LIKWORNIK, individually.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents New York Law School (the "Law School"), Kramer, Levin, Nessen, Kamin & Frankel and Michael B. Reuben (collectively, "Kramer

Levin") submit this brief in opposition to the pro se petition of John B. Bell for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The State of New York (the "State") is also a respondent, but has waived response.[1/]

Petitioner, a would-be lawyer, graduated from the Law School in June 1983 and has been suing it ever since. After losing a contract suit against the Law School in the state courts of New York, petitioner commenced this federal "civil rights" action alleging that the state court decisions against him were erroneous; that the State had violated his constitutional rights because its courts rendered those decisions; and that the Law School and its counsel (Kramer Levin) had conspired to obtain the decisions by knowingly offering inadmissible evidence and incorrect legal arguments, in violation of 42 U.S.C. § 1985.

1/ An additional party named in the caption, Andrea Likwornik, was never served in this action, did not appear in any proceeding below, and is not a respondent in this Court.

Both the District Court and the Court of Appeals found petitioner's claims to be frivolous. The District Court dismissed the complaint and awarded respondents their attorneys' fees under 42 U.S.C. § 1988. The Court of Appeals affirmed, assessing double costs and further attorneys' fees against petitioner under Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1912. Undaunted, petitioner would have this Court consider the same baseless claims, even though the legal arguments he raises as a pretext for review were neither at issue nor ruled upon in the courts below. Because the petition does not identify any error in the decisions actually rendered or the reasoning actually applied below, it should be denied.

POINT ONE

THE PETITION DOES NOT RAISE ANY ISSUE DECIDED BY THE COURTS BELOW, AND, IN ANY CASE, THOSE DECISIONS ARE CORRECT

As to the Law School and Kramer Levin, petitioner would have this Court decide two issues:[2/]

First, he contends that the District Court, when it dismissed the complaint, should not have awarded attorneys' fees to Kramer Levin because Kramer Levin was proceeding as attorneys pro se. But here as before the Court of Appeals, petitioner simply refuses to acknowledge the undisputed fact that Kramer Levin has litigated this action from the beginning on behalf of a client: the Law School. Petitioner's decision to include the Law School's

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2/ Although the State has forgone response, we note in passing that petitioner's challenge to the District Court's dismissal of his complaint against the State was not raised in the Court of Appeals. Accordingly, the Court of Appeals had no occasion to rule on petitioner's novel theory of Sovereign Immunity.

attorneys as additional defendants in no way removed the Law School's need to be represented by counsel or to pay counsel fees. The District Court, which held that the complaint was frivolous and pursued for harassment (App. 22), properly awarded those fees to the Law School and Kramer Levin as prevailing parties under 42 U.S.C. § 1988. The Court of Appeals affirmed in accordance with its previous decisions.[3/]

Second, petitioner contends that his complaint against the Law School and Kramer Levin should not have been dismissed as res judicata under the Full Faith and Credit Statute, 28 U.S.C. § 1738. The short answer is that the District Court did not dismiss the complaint on that basis, and that the Court of Appeals affirmed for reasons wholly apart from any issue of res judicata.

3/ As indicated by the Court of Appeals' citation to Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985), the fee award against petitioner was equally sustainable under Rule 11 of the Federal Rules of Civil Procedure.

As the Court of Appeals recognized in its affirmance, the complaint was dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to allege (i) class-based discriminatory animus -- an essential element of a claim under 42 U.S.C. § 1985, e.g., Griffin v. Breckinridge, 403 U.S. 88 (1971); and (ii) facts constituting a conspiracy. (App. 2)[4/] Not one word in the Court of Appeals' decision (or in the District Court's) even addressed the issue of res judicata.

In short, petitioner has established neither a ground nor a need for this Court to review the decision below. The petition should be denied.

4/ The District Court also held that the present action constituted an impermissible attempt to relitigate final state court proceedings under the guise of a federal civil rights suit. (App. 17, 22) The rule against such relitigation is "well-settled." Hagerty v. Succession of Clement, 749 F.2d 217, 220 (5th Cir. 1984), cert. denied, 106 S. Ct. 333 (1985); see also id., 106 S. Ct. at 333 (Burger, C.J., concurring in denial of certiorari).

POINT TWO

BECAUSE THE PETITION IS FRIVOLOUS AND HAS BEEN FILED SOLELY TO HARASS RESPONDENTS, PETITIONER SHOULD BE SANCTIONED

Rule 49.2 of this Court provides that

> [w]hen an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

Where the judicial process has been grossly abused, this Court has not hesitated to award such damages. See Hatch v. Reliance Insurance Co., 106 S. Ct. 782 (1986); Hyde v. Van Wormer, 106 S. Ct. 403 (1985); Tatum v. Regents of the University of Nebraska, 462 U.S. 1117 (1983). This is such a case.

Petitioner, who has a law degree, has conducted what the Court of Appeals called an "obdurate pursuit of patently meritless claims" against the Law School and its counsel. (App. 2) Petitioner himself conceded in the District Court that these claims were not viable. (See App. 8) When he nevertheless

continued to press them, the District Court found that the action was maintained for harassment. The Court of Appeals agreed. Despite well-established precedent, stern rebukes from four federal judges, and the imposition on two occasions of monetary penalties, petitioner insists on burdening both respondents and this Court with a petition for certiorari pressing the same frivolous claims. That is a gross abuse of the judicial process, and it fully merits sanction.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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